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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT S. SANCHEZ,

Defendant and Appellant.

B231125

(Los Angeles County
Super. Ct. No. SA071910)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Lawrence J. Mira, Judge. Affirmed as modified.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Mary Sanchez and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

This appeal is from a post-plea victim restitution order dated December 1, 2010, requiring defendant to pay victim restitution to the surviving widow of the deceased in the amount of \$1,587,248.45 plus 10 percent interest as of the date of June 28, 2009. Appellant contends that the restitution order should be reduced by the sum of \$23,745.64 for items erroneously imposed by the trial court. We affirm the judgment as modified.

FACTUAL BACKGROUND

On September 20, 2010, the trial court conducted an evidentiary hearing during which, in capsule form, a showing was made that 45-year-old Rodrigo Armas and his 15-year-old son Christian were riding their bicycles when they were struck by a vehicle driven by appellant. Appellant fled the scene of the accident. Rodrigo was killed and Christian was seriously injured. Following the convictions, as hereafter explained, Karen Michelle Armas, wife of Rodrigo and the mother of Christian, was the recipient of the restitution order which is partially challenged on appeal.

The convictions giving rise to the restitution order herein challenged eventually evolved from charges on two counts, namely, leaving the scene of an accident in violation of Vehicle Code section 20001, subdivision (a) and vehicular manslaughter with gross negligence in violation of Penal Code section 192, subdivision (c)(1). Appellant waived his constitutional rights and pled no contest to the aforementioned charges and admitted the great bodily injury enhancement. Pursuant to a plea agreement, the trial court sentenced appellant to a total state prison term of four years, consisting of the midterm of four years for vehicular manslaughter with gross negligence and a concurrent term of four years for leaving the scene of an accident. Additionally, the court imposed a restitution fine of \$800 pursuant to section 1202.4, subdivision (b) of the Penal Code and imposed and stayed a corresponding parole revocation fine in accordance with section 1202.45 of the Penal Code.

PROCEDURAL BACKGROUND

The victim restitution hearing was conducted on September 20, 2010, and December 1, 2010. The People appeared through Mara McIlvain, Deputy District Attorney for the County of Los Angeles. The defendant/appellant did not appear, but was represented by attorney James Armstrong. Defendant's presence was previously excused.

The People called only one witness to testify, namely, Karen Michelle Armas, widow of the deceased. Defendant/appellant called no witnesses to testify. After direct and cross examination, the following exhibits were admitted into evidence:

1. Bill from UCLA Medical Center;
2. Funeral home receipts;
3. W-2 form for Rodrigo Armas and W-2 form for Karen Michelle Armas;
4. Pay stub dated May 15, 2009;
5. Bank of America online banking deposit for Rodrigo Armas;
6. Pay stub; and
7. Letter from Kaiser dated August 5, 2010.

On December 1, 2010, the court signed and filed its order for restitution to Karen Michelle Armas in the amount of \$1,587,248.45 plus 10 percent interest from the date of loss on June 28, 2009, which included an award for the following items:

Value of property damaged;

Medical expenses;

Lost wages or profits of victim Rodrigo Armas and Karen Michelle Armas incurred by victim due to injury to her child and death of her husband.

APPELLANT'S CONTENTIONS

Appellant claims on appeal that certain items of restitution should be reduced and deleted from the restitution order dated December 1, 2010. The basis for appellant's claim is that he is not responsible for certain items testified to at the restitution hearing

and included in the restitution order, but not expressly set forth in the order. Appellant recapitulates those items as follows:

1. The \$3,000 church donation;
2. The \$30,297 medical bill;
3. Kaiser counseling in the amount of \$300 vice \$8,400; and
4. Attorney fees in the amount of \$10,000 vice \$12,500.

We address each item seriatim hereafter, utilizing abuse of discretion as the standard for appellate review. (*People v. Williams* (2010) 184 Cal.App.4th 142; *People v. Foster* (1993) 14 Cal.App.4th 939, 947, superceded by statute on another point.)

The backdrop for analysis of victim restitution as in this case is to be found in the Penal Code under section 1202.4, subdivision (a)(1) as follows: “(a)(1) It is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime.”

Subdivision (f)(3) of Penal Code section 1202.4, further provides as follows:

“(3) To the extent possible, the restitution order shall be prepared by the sentencing court, shall identify each victim and each loss to which it pertains, and shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant’s criminal conduct, including, but not limited to, all of the following:

“(A) Full or partial payment for the value of stolen or damaged property. The value of stolen or damaged property shall be the replacement cost of like property, or the actual cost of repairing the property when repair is possible.

“(B) Medical expenses.

“(C) Mental health counseling expenses.

“(D) Wages or profits lost due to injury incurred by the victim, and if the victim is a minor, wages or profits lost by the minor's parent, parents, guardian, or guardians, while caring for the injured minor. Lost wages shall include any commission income as well as

any base wages. Commission income shall be established by evidence of commission income during the 12-month period prior to the date of the crime for which restitution is being ordered, unless good cause for a shorter time period is shown.

“(E) Wages or profits lost by the victim, and if the victim is a minor, wages or profits lost by the minor’s parent, parents, guardian, or guardians, due to time spent as a witness or in assisting the police or prosecution. Lost wages shall include any commission income as well as any base wages. Commission income shall be established by evidence of commission income during the 12-month period prior to the date of the crime for which restitution is being ordered, unless good cause for a shorter time period is shown.

“(F) Noneconomic losses, including, but not limited to, psychological harm, for felony violations of Section 288.

“(G) Interest, at the rate of 10 percent per annum, that accrues as of the date of sentencing or loss, as determined by the court.

“(H) Actual and reasonable attorney’s fees and other costs of collection accrued by a private entity on behalf of the victim.

“(I) Expenses incurred by an adult victim in relocating away from the defendant, including, but not limited to, deposits for utilities and telephone service, deposits for rental housing, temporary lodging and food expenses, clothing, and personal items. Expenses incurred pursuant to this section shall be verified by law enforcement to be necessary for the personal safety of the victim or by a mental health treatment provider to be necessary for the emotional well-being of the victim.

“(J) Expenses to install or increase residential security incurred related to a crime, as defined in subdivision (c) of Section 667.5, including, but not limited to, a home security device or system, or replacing or increasing the number of locks.

“(K) Expenses to retrofit a residence or vehicle, or both, to make the residence accessible to or the vehicle operational by the victim, if the victim is permanently disabled, whether the disability is partial or total, as a direct result of the crime.

“(L) Expenses for a period of time reasonably necessary to make the victim whole, for the costs to monitor the credit report of, and for the costs to repair the credit of, a victim of identity theft, as defined in Section 530.5.”

Section 1202.4 subdivision (g) further provides: “(g) The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. A defendant’s inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution order, nor shall inability to pay be a consideration in determining the amount of a restitution order.”

Against this statutory background, case law indicates that losses for purposes of victim restitution are not limited to those enumerated in Penal Code section 1202.4 and must be construed broadly and liberally to compensate a victim for any economic loss which is proved to be the direct result of the defendant’s criminal behavior. (*People v. Moore* (2009) 177 Cal.App.4th 1229, 1232; *People v. Crisler* (2008) 165 Cal.App.4th 1503, 1508.)

The \$3,000 church donation

We initially address the \$3,000 donation to the Armases’ family church which was made in light of the counseling services provided by the church. The challenge to this item of restitution lies in the appellant’s claim that this was a donation made voluntarily and did not involve a service for which charges were made. Appellant posits that because there was no charge, there can be no economic loss as is required under the statute. The respondent counters appellant’s argument by pointing out that just because the widow made a voluntary payment to the church, such fact in no way relieves appellant from paying this victim restitution item. Respondent further posits that there is nothing in Penal Code section 1204.4, subdivision (f) that is intended to reward a criminal defendant with a windfall as a result of the generosity of others. Respondent draws an analogy to the collateral source rule in tort cases, which precludes reduction of the amount of restitution even if the victim has received benefits or reimbursement from another source, citing *People v. Hamilton* (2003) 114 Cal.App.4th 932, 944 as authority. We find no

necessity to determine whether the analogy to the collateral source rule is apt or not, as contended by respondent, but instead is to be determined by a reasonableness standard so that a defendant who engages in criminal conduct should not fortuitously benefit from having chosen a victim whose family church was willing to make a donation for pastoral counseling. The trial court did not abuse its discretion in awarding restitution for this item in accordance with the standard set forth in Penal Code section 1202.4, subdivision (g). The testimony of the surviving widow clearly provides evidence to support the reasonableness of this item of restitution and we so hold.

The medical bill from UCLA Medical Center

We now turn our attention to the medical bill from UCLA Medical Center and the assertion by appellant that the claim should be reduced by \$10,145.64. Appellant's argument is based on the premise that he should not be obligated to pay the full amount of the UCLA Medical Center bill for medical treatment in the sum of \$30,297.70 in view of the fact that exhibit 1 admitted into evidence showed that there was not a current balance claimed or owing to UCLA Medical Center following payment by the Armas' family health insurance carrier in the amount of \$20,152.06. Karen Michelle Armas testified that the medical expenses incurred at UCLA Medical Center were necessitated by the injuries suffered by her son as a result of the incident. Ms. Armas further testified that UCLA Medical Center has a lien to take the money from her as a result of the settlement for her son's injuries. Citing *People v. Millard* (2009) 175 Cal.App.4th 7, 27, as decisional authority and quoting the relevant portions of Penal Code section 1202.4, subdivision (f)(3) as statutory authority, appellant emphasizes that the term *fully reimburse* utilized in the statute can only mean that there can be no reimbursement for items that were not charged. As stated in *Millard* "[t]o the extent possible, the restitution order . . . shall be of a dollar amount that is sufficient to *fully reimburse* the victim . . . for every determined economic loss incurred as the result of the defendant's criminal conduct, including . . . [¶] . . . [¶] (B) Medical expenses.' (Italics added.) To 'fully reimburse' the victim for medical expenses means to reimburse him or her for all

out-of-pocket expenses actually paid by the victim or others on the victim's behalf (e.g., the victim's insurance company). The concept of 'reimbursement' of medical expenses generally does not support inclusion of amounts of medical bills in excess of those amounts accepted by medical providers as payment in full."

Appellant claims that the following decisions are in accord: *People v. Tuan Quong Duong* (2010) 180 Cal.App.4th 1533, 1539 and *In re Eric S.* (2010) 183 Cal.App.4th 1560, 1566. The conclusion of appellant is that the restitution order should be reduced by \$10,145.64, the amount over and above that accepted by UCLA Medical Center from the victim's health insurance provider.

Before consideration of respondent's counter argument, *infra*, we note that the *Millard* decision is distinguishable factually from the facts presented in this case. We simply note that in *Millard* the victim was found to be negligent in part under the law of comparative negligence. In this case, the victim, the widow of the deceased, was under no comparative fault for the events leading to the collision. Neither does her injured son appear from this record to have been comparatively at fault.

Respondent's counter argument accentuates the rights of an insurance carrier to subrogation and the duty of the victim policy holder to cooperate with the policy issuer to enforce its subrogation right. Respondent makes the following argument: "The victim restitution laws are structured to award the victim full compensation for losses *without* offsets based on insurance payments, because the victim is generally obligated by his or her insurance contract to cooperate with the insurer's right of subrogation. (Cal. Const., art. I, § 28; § 1202.4, subd. (f)(2); see *People v. Birkett* (1999) 21 Cal.4th 226, 247, fn. 19 [analogizing to collateral source doctrine, where '[t]he victim obtains no double recovery to the extent his contractual arrangement with his insurer calls for subrogation or refund of insurance benefits in light of a recovery in tort']; *People v. Hamilton, supra*, 114 Cal.App.4th at p. 941 [the defendant was not entitled to offset a payment made by his mother's insurer to the victim]; *People v. Bernal* (2002) 101 Cal.App.4th 155 [victims of crimes have a right to restitution regardless of the indemnification or subrogation rights

of third parties]; *In re Brittany L.* (2002) 99 Cal.App.4th 1381, 1387-1389 [the minor was not entitled to offset of payments made to the victims by their homeowner's insurance carrier].) Therefore, Ms. Armas' loss and appellant's corresponding obligation to pay her restitution should not be reduced by any amounts she received from her medical insurance carrier."

Prior to oral argument we requested counsel to brief and be prepared to discuss the effect of *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 on the issue of restitution in this case. Appellant responded in writing contending that *Howell* was applicable to this case. The court in *Howell* stated:

"When a tortiously injured person receives medical care for his or her injuries, the provider of that care often accepts as full payment, pursuant to a preexisting contract with the injured person's health insurer, an amount less than that stated in the provider's bill. In that circumstance, may the injured person recover from the tortfeasor, as economic damages for past medical expenses, the undiscounted sum stated in the provider's bill but never paid by or on behalf of the injured person? We hold no such recovery is allowed, for the simple reason that the injured plaintiff did not suffer any economic loss in that amount. . . .

"We hold, therefore, that an injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial. In so holding, we in no way abrogate or modify the collateral source rule as it has been recognized in California" (*Howell v. Hamilton Meats & Provisions, Inc., supra*, 52 Cal.4th at pp. 548, 566.)

Thus appellant contends pursuant to *Howell*, the amount recoverable as restitution is \$20,152.06 because UCLA Medical Center accepted this amount as full payment and the amount ordered by the trial court must be reduced.

The People responded with a letter brief contending *Howell* has no application to the issues in this case and no reduction in restitution is warranted because *Howell* was a

civil tort case dealing with compensatory damages under the Civil Code and this is a criminal case involving victim restitution under Penal Code section 1202.4, subdivision (f). More specifically, respondent argues, *Howell* did not address or contemplate the rehabilitative and deterrent purposes of victim restitution under the Penal Code.

The People contend the trial court's order imposing restitution in the full amount billed (\$30,297.70) rather than the amount paid by Mrs. Armas's medical insurer to UCLA Medical Center (\$20,152.06) was a proper exercise of the court's broad discretion particularly when her son who was injured by appellant's crime is facing continuing care costs. Furthermore, it argues there is no evidence that UCLA Medical Center had "written off" the unpaid amount or that it would not pursue collection of the unpaid amount and in fact, the hospital had placed a lien on Mrs. Armas's settlement with appellant's automobile insurance company. Exhibit 1, however, demonstrates an insurance adjustment of the disputed amount, and an account balance of zero.

We are persuaded by appellant's argument that *Howell* is applicable and hold the trial court did commit an abuse of discretion in awarding the billed amount of \$30,297.70 for medical restitution and that the amount actually paid (\$20,152.06) should have been awarded by the trial court. Case law and the language of Penal Code section 1202.4 does not support the People's position. Penal Code section 1202.4, subdivision (f) provides for restitution in an amount "sufficient to *fully reimburse* the victim . . . for every determined economic loss incurred as the result of the defendant's criminal conduct including . . . medical expenses." (Italics added.) Fully reimburse means to reimburse him or her for all out-of-pocket expenses actually paid by the victim or others on the victim's behalf. Reimbursement of medical expenses generally does not support inclusion of amounts of medical bills in excess of those amounts *accepted* by medical providers as payment in full. "[W]hen a medical care provider has, by agreement with the plaintiff's private health insurer, accepted as full payment for the plaintiff's care an amount less than the provider's full bill, evidence of that amount is relevant to prove the plaintiff's damages for past medical expenses Evidence that such payments were

made in whole or in part by an insurer remains, however, generally inadmissible under the evidentiary aspect of the collateral source rule. [Citation.]” (*Howell v. Hamilton Meats & Provisions, Inc.*, *supra*, 52 Cal.4th 541, 567.)

Kaiser counseling bill in the amount of \$8,400

Appellant’s next contention pertains to the Kaiser medical restitution item in the amount of \$8,400. Appellant claims the amount of restitution for this item consisting of group therapy counseling for her and her son should be reduced to \$300. This court sees the argument as one in lock step with the argument made by appellant pertaining to the UCLA Medical Center item dealt with *supra*. Appellant contends that the victim was only required to expend sums amounting to her copay obligation total of \$300 and not the full amount of the Kaiser bill in the amount of \$8,400, citing the same decisional authority as with the UCLA Medical Center claim.

Respondent’s counter argument is merely a replica of arguments made in connection with the UCLA Medical Center claim but repeating the respondent’s opinion that the subrogation rights of the insurer must lead to a decision to deny a reduction for only the co-pay payments of the victim.

We find the rationale of *Howell* applies to the Kaiser bill as well. Mrs. Armas is entitled to the medical expense incurred with Kaiser (\$300 as her copay obligation) rather than the amount billed (\$8,400).

Attorney fees

Appellant’s final contention centers on the attorney’s fee award to the victim in the amount of \$12,500 which appellant contends must be reduced to \$10,000. In making his argument for a reduction of \$2,500, appellant resorts to the substantial evidence rule on appeal contending there is no substantial evidence to support the additional \$2,500 award. Appellant supports his argument by citing to the record where the victim testified that in hiring an attorney for the purposes of handling settlement negotiations with her insurance carrier she entered into a contract requiring an initial retainer of \$2,500, but that the matter eventually cost the client 15 to 20 hours of attorney’s time at the rate of

\$500 per hour. Appellant claims that 20 hours of time at the rate of \$500 per hour amounts to \$10,000 vice \$12,500, thereby entitling appellant to a reduction of \$2,500 for what in essence amounts to the initial retainer amount. Appellant concludes that substantial evidence fails to demonstrate entitlement to the additional \$2,500 and must therefore be reduced accordingly. Appellant cites *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 669 for the proposition that a restitution award under the victim restitution law must be supported by substantial evidence. We agree with the proposition that the record must contain substantial evidence upon which to further consider a claim of trial court abuse of discretion.

Respondent makes its counter argument relying initially on the claim that failure to make an objection to the attorney's fees restitution order constitutes a waiver of the right to raise the issue on appeal, citing *People v. Williams* (2000) 78 Cal.App.4th 1118, 1126 as authority, albeit in connection with differing circumstances where, in a battered women's syndrome case, there was a failure to make two trial objections constituting differing grounds urged on appeal. However, the issue here concerns whether the amount is supported by substantial evidence. In such a case, no objection is required to preserve the issue for appeal. As stated in *In re K.F.* (2009) 173 Cal.App.4th 655, 660, "Sufficiency of the evidence has always been viewed as a question necessarily and inherently raised in every contested trial of any issue of fact, and requiring no further steps by the aggrieved party to be preserved for appeal."

Respondent further maintains that a retainer is a sum of money paid by a client to secure an attorney's availability over a given period of time, thus such a fee is earned by the attorney when paid because the attorney is entitled to the money regardless of whether he actually performs any services for the client, citing *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164 as authority.

We are not persuaded by respondent's argument. A retainer can be applied either to services performed or to secure availability of counsel over a period of time. There is no evidence in the record that demonstrates that this was the latter, which would be

necessary to support an award beyond \$10,000. Counsel simply has not carried its burden to support \$12,500 for attorney fees.

DISPOSITION

The judgment is modified by reducing restitution for the UCLA Medical Center bill to \$20,152.06, reducing restitution for the Kaiser bill to \$300, and reducing the award for attorney fees to \$10,000. In all other respects, the judgment is affirmed. The trial court is directed to forward to the Department of Corrections and Rehabilitation an amended abstract of judgment reflecting the above modifications. No costs are awarded on appeal.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.